BBC Estate V Sdn Bhd & Ors v TR Madel anak Kandou & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO Q-02–1116 OF 2005

MOHD GHAZALI, KN SEGARA AND ABU SAMAH NORDIN JJCA

11 DECEMBER 2007

Civil Procedure — Striking out — Action — Whether plaintiffs' claim obviously unsustainable — Whether plaintiffs' statement of claim disclosed facts which would merit a trial of the action — Rules of the High Court 1980 O 18 r 19

Land Law — Customary land — Claim of — Plaintiffs claiming prior customary rights over land alienated and registered to defendants — No evidence that plaintiffs surrendered such rights — Whether plaintiffs' claim obviously unsustainable and ought to be struck out — Whether there ought to be a trial of the claim instead — Rules of the High Court 1980 O 18 r 19

The fifth defendant — the Superintendent of Lands and Surveys Bintulu ('the Supt') — alienated several pieces of land and issued several lots to the first to fourth defendants who then registered their interests ('the defendants' land). The plaintiffs claimed that the defendants' land overlapped their own land ('the plaintiffs' land'), upon which the plaintiff enjoyed and exercised native customary rights which had not been extinguished or surrendered. The plaintiff thus filed and served a writ of summons and statement of claim, claiming various declarations and injunctions. Against the first to fourth defendants, the plaintiffs claimed, inter alia, for a declaration that the plaintiffs enjoyed native customary rights over their land; and for an injunction preventing the first to fourth defendants from trespassing upon their (the plaintiffs') land. Against the fifth defendant, the plaintiffs sought, inter alia, a declaration that the fifth defendant's issuance of the lots to the defendants was null and void. The first to third defendants jointly applied to strike out the plaintiffs' writ of summons and statement of claim, under O 12 r 7 and O 18 r 19 of the Rules of the High Court 1980 ('RHC'). In the High Court, their application was dismissed and they appealed to the Court of Appeal. In the Court of Appeal, the first to third defendants only pursued the striking out application under O 18 r 19. The main argument of the first to third defendants was that as registered owners of the defendants' land, they had acquired indefeasible titles to the lots alienated to them.

Held, dismissing the appeal with costs:

(1) The law and principles applicable to striking out actions under O 18 r 19 of the RHC are very clear and settled. The summary procedure should only be adopted when it is conspicuously clear that the claim on the face of it is obviously unsustainable. In the instant case, the High Court judge had the *Bandar Builder* principles in mind when he dismissed the first to third defendants' application (see paras 10–11); *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36 followed.

(2) The defendants failed to appreciate that the plaintiff also sought declarations against the fifth defendant who would have to respond to issues concerning, inter alia, native customary rights, alienation of land before such rights had been terminated and compensation for such termination. Further, the fifth defendant had not applied to strike out the plaintiffs' action nor supported the defendants' application, in particular the 'indefeasibility of titles' issue (see para 13).

(3) The indefeasibility issue would be a very critical issue of fact and law at the trial. Based on the statement of claim it would turn on the evidence adduced by the plaintiffs and the fifth defendant on the issue of native customary land and native customary rights asserted by the plaintiffs (see para 14).

(4) In a striking out application under O 18 r 19 of the RHC, the court should determine whether the pleadings disclosed facts which would merit the trial of the action. In the instant case, the plaintiffs' statement of claim clearly disclosed facts which would merit a trial of the action (see para 19).

[Bahasa Malaysia summary

Defendan kelima — Penguasa Tanah dan Ukur Bintulu ('Penguasa') — telah memperoleh beberapa bidang tanah dan mengeluarkan beberapa lot kepada defendan-defendan pertama hingga keempat yang kemudian telah mendaftarkan kepentingan mereka ('tanah defendan-defendan'). Plaintif-plaintif telah menuntut bahawa tanah defendan-defendan bertindan dengan tanah mereka sendiri ('tanah plaintif-plaintif'), yang mana plaintif menikmati dan menggunakan hak–hak adat penduduk asal yang tidak dilenyapkan atau diserahkan. Plaintif kemudian telah memfailkan dan menyerahkan writ saman dan penyataan tuntutan, menuntut pelbagai deklarasi dan injunksi. Terhadap defendan-defendan pertama hingga keempat, plaintif-plaintif menuntut, antara lain, untuk satu deklarasi bahawa plaintif-plaintif menikmati hak-hak adat penduduk asal ke atas tanah mereka; dan untuk satu injunksi menghalang defendan-defendan pertama hingga

keempat menceroboh ke atas tanah mereka (plaintif-plaintif). Terhadap defendan kelima, plaintif-plaintif memohon, antara lain, satu deklarasi bahawa pengeluaran lot-lot oleh defendan kelima kepada defendan-defendan adalah terbatal dan tidak sah. Defendan-defendan pertama dan ketiga bersesama memohon untuk membatalkan writ saman dan penyataan tuntutan plaintif-plaintif, di bawah A 12 k 7 dan A 18 k 19 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Di Mahkamah Tinggi, permohonan mereka telah ditolak dan mereka telah merayu ke Mahkamah Rayuan. Di Mahkamah Rayuan, defendan-defendan pertama hingga ketiga hanya mengemukakan permohonan pembatalan di bawah A 18 k 19. Hujah utama defendan-defendan pertama hingga ketiga adalah bahawa sebagai pemilik-pemilik berdaftar tanah defendan-defendan, mereka telah memperoleh hak milik tak boleh sangkal terhadap lot-lot yang dipindah milik kepada mereka.

Diputuskan, menolak rayuan dengan kos:

(1) Undang-undang dan prinsip-prinsip yang terpakai untuk membatalkan tindakan-tindakan di bawah A 18 k 19 KMT adalah jelas dan tetap. Prosedur terus hanya boleh digunakan apabila ia amat jelas bahawa tuntutan pada asasnya nyata tidak boleh dikekalkan. Dalam kes ini, hakim Mahkamah Tinggi telah mengambilkira prinsip-prinsip *Bandar Builder* semasa beliau menolak permohonan defendan-defendan pertama hingga ketiga (lihat perenggan 10–11); *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36 diikut.

(2) Defendan-defendan telah gagal untuk menyedari bahawa plaintif juga memohon deklarasi-deklarasi terhadap defendan kelima yang perlu menjawab isu-isu berkaitan, antara lain, hak-hak adat penduduk asal, pemerolehan tanah sebelum hak-hak tersebut dibatalkan dan pampasan untuk pembatalan tersebut. Bahkan, defendan kelima tidak memohon untuk membatalkan tindakan plaintif-plaintif mahupun menyokong permohonan defendan-defendan, khususnya isu 'indefeasibility of titles' (lihat perenggan 13).

(3) Isu hak milik tak boleh sangkal adalah isu fakta dan undang-undang yang kritikal semasa perbicaraan. Berdasarkan penyataan tuntutan ia lebih kepada keterangan yang dikemukakan oleh plaintif-plaintif dan defendan kelima berhubung isu tanah adat penduduk asal dan hak-hak adat penduduk asal yang dituntut oleh plaintif-plaintif (lihat perenggan 14).

(4) Dalam membatalkan permohonan di bawah A 18 k 19 KMT, mahkamah hendaklah menentukan sama ada pliding mendedahkan fakta-fakta yang mewajarkan perbicaraan tindakan itu. Dalam kes ini, penyataan tuntutan plaintif-plaintif jelas menunjukkan fakta-fakta yang mewajarkan perbicaraan tindakan tersebut (lihat perenggan 19).]

Notes

For a case on claim of customary land, see 8 *Mallal's Digest* (4th Ed, 2006 Reissue) para 2701.

For cases on striking out an action, see 2(3) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 6655–6693.

Cases referred to

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36 (folld)

Legislation referred to

Federal Constitution art 13
Rules of the High Court 1980 O 12 r 4(b), O 12 r 6, O 12 r 7, O 18 r 19
Sarawak Land Code ss 2, 13(1), 15(1), 132(1)

Appeal from: Suit No 22–2 of 2005 (High Court, Bintulu)

Henry Ling Kuong Meng (Ling & Wong) for the appellants.
Baru Bian (Baru Bian) for the respondent.

KN Segara (delivering judgment of the court)::

[1] The five plaintiffs, representing themselves and 79 other family units of Rumah Madel, filed a writ of summons together with a statement of claim on 2 February 2005 in the High Court in Sabah and Sarawak at Bintulu (Suit No 22–2 of 2005(BTU)) against the five defendants claiming, inter alia:

(a) a declaration that the plaintiffs have acquired native customary rights over the said land marked in the map attached to the statement of claim;

(b) a declaration that this right precludes the first, second, third and fourth defendants and or their servant(s) and/or agent(s) and/subcontractor(s) and/or assignee(s) from impairing or abridging the plaintiffs' native customary rights;

(c) a decree of perpetual injunction against the first, second, third and fourth defendants restraining them and or their servant(s) and/or agent(s) and/or subcontractors) and/or assignee(s) from further trespassing on the said land;

(d) a declaration that the issuance by the fifth defendant of Lots 20, 21, 22 and 23 to the first, second, third and fourth defendants, respectively (that parts of Lots 20, 21, 22 and 23 which extend onto plaintiffs' said land), without first extinguishing the native customary rights over the said land was null and void;

(e) a declaration that the issuance by the fifth defendant of Lots 20, 21, 22, and 23 to the first, second, third and fourth defendants, respectively (that parts of Lots 20, 21, 22 and 23 which extend onto the plaintiffs' said land, without paying the plaintiffs' any compensation in accordance with the provisions of the Land Code, Sarawak, is null and void;

(f) further and/or in the alternative, a declaration that the issuance of Lots 20, 21, 22 and 23 to the first, second, third and fourth defendants, respectively, without paying the plaintiffs adequate compensation, was unconstitutional, against art 13 of the Federal Constitution and therefore, null and void;

[2] The first, second, third and fourth defendants are the registered owners of four individual parcels of land described as Lot 20 Block 34 Kemena Land District, Lot 21 Block 34 Kemena Land District, Lot 22 Block 34 Kemena Land District and Lot 23 Block 34 Kemena Land District, respectively. The fifth defendant is the Superintendent of Lands and Surveys, Land Department, Bintulu, Sarawak, who has jurisdiction over the said lands in dispute.

[3] The plaintiffs who are all natives of Sarawak and of the Iban tribe and are now residing at Rumah Madel, assert in the statement of claim that their claims are founded on native customary rights over land referred to as native customary land, namely, the area shaded green in the map annexed to the statement of claim. The said land is locally known as 'pemakai menoa'. The boundary of the said land has been detailed under para 7 of the statement of claim.

[4] The plaintiffs have pleaded that the native customary rights had been acquired or created before 1 January 1958 by their ancestors where they dwelled, occupied, cultivated, planted fruit trees and buried their dead, on the said land. The said land subsists as such until today. The basis of claiming such rights are stated in para 8 of the statement of claim as follows:

PARTICULARS

(i) The plaintiffs and/or their ancestors originated from the Second Division sometime in the 1870s to settle within the said land. The plaintiffs and or their ancestors settled and/or farmed the said land

and/or roamed its forests for food until today. The plaintiffs shall detail their history at the trial of this action

(ii) The plaintiffs never abandoned their said land and they have been in continuous occupation of the same.

(iii) The said land still subsists as it were, being the source of their livelihood, as a farming land, hunting ground and as stated under the particulars in para 13 below.

[5] In paras 9, 10, 11, 12 and 13 of the statement of claim the plaintiffs have pleaded as follows:

9. The plaintiffs claim that the first and/or second and/or fourth defendants and/or their servants or agents had been unlawfully issuing notices to the plaintiffs to surrender their rights over the said land and/or individual lands within the said land, without any legal basis and/or in accordance with the provisions of the Sarawak Land Code.

10. The boundaries of the said Lots 20, 21, 22 are within the boundaries of the said Land and part of the boundary of Lot 23 overlapped with the boundary of the said land (as reflected in the map attached marked 'M').

11. The plaintiffs claim that Lots 20, 21, 22, and part of Lot 23 that overlapped with the boundary of the said land are an infringement and/or an impairment of the plaintiffs' NCR over the said land therefore the issuance of the said lots were unconstitutional and/or unlawful and/or improper.

12. Further and/or in the alternative the plaintiffs claim that the issuance of the said Lots 20, 21, 22 and 23 to the first, second, third and fourth defendants were unconstitutional and/or unlawful under art 13 of the Federal Constitution and/or the same was not issued in accordance with the provisions of the Sarawak Land Code (Cap 81) 1958.

13. Further and/or alternatively, the plaintiffs state that have acquired rights over the said Land by virtue of the plaintiffs' customs and/or adat and/or by virtue of principles of common law.

Particulars

(i) the creation and/or acquisition of native customary rights over the said land was in accordance with the plaintiffs' custom;

(ii) the plaintiffs have for generations preserved this land this said land to meet their domestic needs; and/or

(iii) the said land is the source of their livelihood where the plaintiffs can roam to hunt wild animals and fish in the rivers and streams therein; and/or

(iv) the land is not only a source of life for the plaintiffs but it constitutes life itself;

(v) the plaintiffs are still in occupation of the said land; and

(vi) the plaintiffs preserved this land for the future generations of their community to ensure that their people survive.

[6] The first, second and third defendants received the writ of summons and statement of claim on 28 March 2005 through individual prepaid registered post. On 1 April 2005 they filed individual ex parte summons in chambers seeking leave to enter conditional appearance. A conditional appearance under O 12 r 6 of the Rules of the High Court 1980 ('RHC') is a prelude to an application under O 12 r 7 of the RHC to strike out the writ. A conditional appearance is a complete appearance to the action for all purposes subject only to the right reserved by the defendants to set aside the writ or service of the writ under O 12 r 7 of the RHC. Upon obtaining leave to enter conditional appearance the solicitors for the said three defendants served the memorandum of conditional appearance on the solicitors for the plaintiffs on 2 April 2005 and thereafter, filed a summons in chambers together with an affidavit in support of Mr Yet Nai Sing, in which the first, second and third defendants made a joint application for an order that the writ of summons and statement of claim be set aside or struck out. The said application was for all intents and purposes an application under O 12 r 7 of the RHC as well as an application under O 18 r 19 of the RHC.

[7] The said three defendants relied on three basic grounds, that is:

(i) The said writ dated 2 February 2005 is defective in reducing the prescribed period for entering the defendants' appearance in contravention of O 12 r 4(b) of the RHC.

(ii) The representative action of the plaintiffs is misconceived and not maintainable as the writ did not show or disclose the true names and identities of the persons whom the plaintiffs claimed to represent (the 79 family units or *bilik*).

(iii) The statement of claim dated 4 January 2005 discloses no reasonable cause of action, or it is scandalous, frivolous or vexatious, or it may prejudice, embarrass or delay the fair trial of the action, or it is otherwise an abuse of the process of the court.

[8] The learned High Court judge at Bintulu dismissed the said application by the said three defendants on 13 September 2005 and hence, this appeal. The appellants and respondents before us shall be referred to as, the said three defendants and plaintiffs, respectively.

[9] The said three defendants abandoned the application to set aside the writ under O 12 r 7 of the RHC and therefore the appeal before us is only in respect of the application for the plaintiffs' action to be struck out under O 18 r 19 of the RHC.

[10] At the very outset we wish to state that the law and principles applicable to striking out actions under O 18 r 19 of the RHC are very clear and settled. The summary procedure should only be adopted when it is conspicuously clear that the claim on the face of it is obviously unsustainable. In *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36 the Supreme Court held:

> The principles upon which the court acts in exercising its power under any of the four limbs of O 18 r 19(1) of the Rules of the High Court 1980 are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule and the summary procedures can only be adopted when it can clearly be seen that a claim or answer is on the face of it 'obviously unsustainable'. It cannot be exercised by a minute examination of the documents and facts of the case in order to see whether the party has a cause of action or a defence.

[11] Bearing the above principles in mind, we shall approach this appeal by the said three defendants against the decision of the learned High Court judge, dismissing the application in the following words:

> Having heard counsel and read the written submission —1 ruled that there are serious issue for trial. The defendant grounds are based merely on technical and procedural impropriety. However court should have regard to substantial justice of the case in the light of the new O 1A of the High Court Rule 1980. Therefore the first, second and third application in encl 32 is hereby dismissed with cost. Cost to the plaintiff.

[12] We do not have the benefit of the written grounds of decision of the learned judge. It would appear from the above ruling greater emphasis has been given in his deliberation to that part of the application pertaining to the

setting aside of the writ under O 12 r 7 of the RHC, which was incorporated in the same application under O 18 r 19 of the RHC. Nevertheless, we are of the view he had the principles set out in *Bandar Builder* in mind, as well, when he dismissed the said three defendants' application.

[13] The said three defendants thrust in arguing that the plaintiffs' action is unsustainable is based on the fact that the said three defendants are the registered owners of Lots 20, 21 and 22 and therefore under the provisions of s 132(1) of the Sarawak Land Code ('Land Code') they have thereby acquired indefeasible titles to the said lots. What they have failed to appreciate is that the claim of the plaintiffs is also for declarations against the fifth defendant (Superintendent Lands and Surveys Bintulu Sarawak) who will have to furnish answers in relation to the central issue in this case touching on native customary land, native customary rights therein and, the alienation of state land before all customary rights therein have been surrendered or terminated, or provisions made for compensating the persons entitled to such rights. It is to be noted that the fifth defendant has neither made any application to strike out the plaintiffs' action nor filed any affidavit in support of the said three defendants' application regarding the indefeasibility issue of their title, by reason of the fact the said lands were never native customary land subject to any native customary rights, immediately before the issuance of the said lots to the said three defendants.

[14] The indefeasibility issue will be a very critical issue of fact and law at the trial. Based on the statement of claim it may hinge on the evidence adduced by the plaintiffs and the fifth defendant on the issue of native customary land and native customary rights asserted by the plaintiffs.

[15] Native customary land is interpreted at s 2 of the Land Code to mean:

(a) land in which native customary rights, whether communal or otherwise, have lawfully been created prior to the 1st day of January, 1958, and still subsist as such;

(b) ...

(c) ...

(d) ...

[16] It would appear that under the Land Code, native customary land may not be alienated:

13(1) Subject to the direction of the Minister under section 3(1A), the Director may alienate State Land, other than Native Customary Land.

[17] Under the Land Code, native customary rights are protected:

15(1) Without prejudice to sections 18 and 18A, State land shall not he alienated until all customary rights therein have been surrendered or terminated or provision has been made for compensating the persons entitled to such rights.

[18] From the statement of claim it is clear that the plaintiffs are claiming that their native customary rights over the subject land have lawfully been created prior to 1 January 1958 and still subsists as such land and it is thus native customary land. The said three defendants have not shown that the plaintiffs have surrendered their native customary rights over the land. There is also no evidence adduced by the said three defendants that such native customary rights have been terminated or compensation has been paid to the plaintiffs.

[19] An application to strike out an action under O 18 r 19 of the RHC should not descend into a trial on affidavits. What the court should be concerned with is to determine whether the pleadings disclosed facts which merit a trial of the action. The plaintiffs' statement of claim herein certainly disclosed facts which merit a trial of the action.

[20] We are unanimous that this appeal be dismissed with costs. Deposit for this appeal to respondent on account of taxed costs.

Appeal dismissed with costs.

Reported by Andrew Christopher Simon